
(2021) 12 CESTAT CK 0005

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 50502 Of 2021

M/s. Modi Agro Products

APPELLANT

Vs

Commissioner, Central Excise CGST, Bhopal

RESPONDENT

Date of Decision : 03-12-2021

Acts Referred:

Central Goods and Services Tax Act, 2017 — Section 142
Central Excise Act, 1944 — Section 11B, 35F

Citation : (2021) 12 CESTAT CK 0005

Hon'ble Judges : Rachna Gupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. The order of Commissioner (Appeals) bearing No.0125/2020 dated 29.09.2020 has been assailed vide which the rejection of refund claim of the appellant for an amount of Rs.21 Lakhs has been upheld. The facts in brief as follows:-

The appellants were engaged in manufacture of pesticides, fungicides, herbicides, weedicides and insecticides. Based upon an investigation conducted by DGCEI in the year 2013 observing that the appellant has manufactured and removed excisable goods to specified parties without assessing their duty liability properly that two show cause notices dated 07.11.2016 and 02.08.2016 were served upon the appellants proposing the recovery of duty amount of Rs.7,24,78,627/- and Rs.12,96,503/- respectively. The demand was initially confirmed whereafter appeal before this Tribunal was filed.

Vide Final Order No.51154-51158/2019 dated 17.07.2019, the matter was remanded back for fresh adjudication after proper verification and examination of records. Before the issuance of the said two show cause notices

appellant had deposited a sum of Rs.65 Lakhs as per the directions of investigating officers of DGCEI Rs. 6 Lakhs wherein was deposited by way of maintaining minimum balance in Cenvat Credit Register. After the aforesaid order of CESTAT, refund of Rs.44 Lakhs as an amount of pre-deposit was sanctioned to the appellant vide Order-in-Original No.30/2019-20 dated 17.12.2019. Subsequently, vide application dated 04.12.2019, the appellant applied for refund of Rs.21 lakhs with the interest. However, vide show cause notice No.07/2019-20 dated 17.01.2020 the refund was proposed to be rejected. The said proposal has been confirmed by Order-in-Original No.36/2019-20 dated 18.02.2020 the appeal thereof has been rejected vide the order under challenge. Being still aggrieved, the appellant is before this Tribunal.

2. I have heard Mr. N.K. Gupta, Advocate for the appellant and Ms. Tamanna Alam, Authorized Representative.

3. Learned Counsel for the appellant submitted that the Adjudicating Authority below has wrongly considered the amount of Rs.15 Lakhs out of

claimed Rs.21 Lakhs as a payment of duty while rejecting the same. Similarly, the rejection of balance Rs.6 Lakhs has also been rejected on a wrong

ground of not producing any proof that the said amount has been debited/paid in the pre-GST Regime. Learned Counsel has submitted that balance-

sheet/ excise return as was furnished post new GST Act, on 01.07.2017 has been placed on record showing said Rs.6 Lakhs have not been forwarded

to the GST era but being shown as the balance lying in their Cenvat Credit Account as on 30th June 2017.

4. Ld. Counsel has laid emphasis upon section 142 of CGST Act in pursuance whereof such balance has to be refunded in cash to the assessee. The

order under challenge is, accordingly, prayed to be set aside and appeal is prayed to be allowed.

5. To rebut the submissions, Id. D.R. has laid emphasis upon the findings in para 6, 7 & 8 of the Order under challenge wherein it has been

appreciated that any payment made during the course of investigation or audit prior to the date on which appeal is filed, to the extent of 7.5% or 10%,

can be considered to be a deposit made towards fulfillment of stipulation under section 35F of the Central Excise duty. Accordingly, the amount of

pre-deposit in the present case was Rs.44 Lakhs which has already been

refunded vide Order dated 17.12.2019. Rs.21 Lakhs since cannot be considered as pre-deposit, hence, has rightly been rejected. Rs.6 Lakhs out of said Rs.21 Lakhs same has rightly been denied to be refunded for want of it not being debited into GST regime. The order is accordingly, prayed to be upheld. Appeal is prayed to be dismissed.

6. After hearing the parties, considering the rival contentions and perusing the record, I am of the opinion as follows:-

The Department while rejecting the refund of Rs.15 Lakhs out of Rs.21 Lakhs claimed has solely relied upon para 3 of Circular No.984/08/2014 dated

16.09.2014 wherein it has been clarified by the Board that amount deposited in excess of the mandatory pre-deposit shall not be treated as deposit

under section 35 F of the Central Excise Act. The amount of Rs.66 Lakhs (including impugned Rs.21 Lakhs) was the amount paid during investigation

itself much prior the issuance of the Show Cause Notices demanding duty from the appellant. The impugned refund cannot be called as refund of

amount of pre-deposit nor has been claimed so by the appellant. The amount to the extent of pre-deposit out of aforesaid Rs.66 Lakhs was Rs.44

Lakhs which has already been refunded in favour of the appellant. The proposals of duty demand have been set aside. Hence, it becomes clear that

appellant was not liable to pay Rs.66 Lakhs. Rs.44 Lakhs whereof were required as an amount of pre-deposit till the appeal of the appellant was not

decided by the Tribunal. Once the Tribunal's order setting aside the demand had attained finality, the amount equivalent to the 10% of the

impugned duty was calculated as Rs.44 Lakhs, hence, was refunded. However, Rs. 21 Lakhs is also part of such money of appellant for which he

was never liable towards the Department. Accordingly, Department is not entitled to retain the same or to become unjustly rich by retaining the money

of the assessee. Once the proposed duty demand against the appellants stands set aside, the entire basis of deposit as was made by the appellant fails

to survive. Department cannot be allowed to retain any part of the said amount.

Above all, whenever any amount is paid during investigation it is a deposit made under protest and cannot be called as duty paid under

protest. I draw my reliance from the decision in the case of EBIZ. Com Pvt. Ltd. vs. CCE reported as 2016 (9) TMI 1274 by Allahabad High

Court. The Hon'ble High Court had held in this case that any money lying with

the Department on account of a deposit being made by the assessee during pendency of proceedings, the same is in the nature of deposit or pre-deposit till it is not appropriated. Till this stage, the Revenue can only be a custodian but once the demand stands set aside, Revenue cannot retain the amount of deposit made by the assessee towards the proposal of the said duty demand. Accordingly, the amount of Rs.21 Lakhs is an amount of deposit made under protest it cannot be called as duty.

Question of applicability of section 11B of Central Excise Act does not at all arise. The findings of Commissioner (Appeals) to this effect are, therefore, held to be wrong.

7. Coming to the rejection to the extent of Rs.6 Lakhs on the ground of no proof for said amount to be debited from the credit ledger, it is observed from the record that the said amount of Rs.6 Lakhs is depicted in ER-1 for the period June, 2017 as a closing balance. The GST regime was introduced w.e.f. July 1, 2017. It is also observed that the said amount has not been claimed as credit under GST through form GST TRAN-1. Hence, it was the amount which is standing as a closing balance in ER-1 as on June 30, 2017 which was not transferred to GST Regime. Hence, is as good as the cash lying with the Department and has to be treated as equal to the debit of the Cenvat account in terms of Section 142 of GST Act. The said amount has mandatorily to be refunded to the assessee in cash.

8. From the above discussion, it stands clear that appellant is entitled for refund of Rs.15 Lakhs as were paid in cash by him at the time of the investigation of the impugned proceedings and is also entitled for refund of Rs.6 Lakhs in cash as was being paid from his Cenvat Credit Account at the same stage as mentioned above and that appellant has been held to not to be liable to pay the alleged amount of duty which includes said Rs.21 Lakh also. Accordingly, I hold that refund claim of Rs.21 Lakhs has wrongly been rejected by the Adjudicating Authority below. Order accordingly, is hereby set aside. Pursuant thereto, appeal in hand stands allowed.

[Order pronounced in the open Court on 03.12.2021]